

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level
Determination of Madalin Ann Johnson

ORDER

By a written motion filed December 19, 1996, Madalin Ann Johnson ("Ms. Johnson") has filed a motion seeking an order closing the administrative hearing in this matter to the public. The End of Confinement Review Committee ("Review Committee") submitted a written response to the motion on December 24, 1996.

Ms. Johnson is represented by Ronald H. Ortlip, Esq., Legal Advocacy Project, 2829 University Avenue S.E., Suite 600, Minneapolis, Minnesota 55414. The Review Committee is represented by Alan Held, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127.

Based upon the memoranda filed by the parties, all of the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

- (1) The hearing shall be closed to the general public.
- (2) The hearing record in this matter, and the final decision, are "Not Public".
- (3) The victim or victims and the law enforcement agency or their designees may attend the hearing if they elect to do so, but must file a completed Notice of Appearance form with the Chief Administrative Law Judge on or before January 10, 1997, if they wish to attend the hearing.
- (4) This Order is public.

Dated this 7th day of January 1997.

KEVIN E. JOHNSON
Chief Administrative Law Judge

MEMORANDUM

On November 18, 1996, Madalin Johnson appeared before the Review Committee and was classified at a Risk Level II under the Minnesota Community

Notification Act. Minn. Laws 1996, Ch. 408, Art. 5. Ms. Johnson is a sex offender within the meaning of the Act, who is scheduled to be released from the correctional facility at Shakopee. Ms. Johnson has exercised her right for an administrative review of the End of Confinement Review Committee's risk assessment determination by requesting a hearing on the record before an Administrative Law Judge under Minn. Stat. § 244.052, subd. 6 (1996).

Ms. Johnson makes several arguments in support of her request that the hearing be closed or not public. First, she argues that highly personal information about her will be discussed in the hearing. Secondly, she argues that a public hearing might incur greater notoriety than would have occurred through the statutory notification process, contrary to legislative intent, and resulting in a chilling effect on offenders' decisions to exercise their right to review. Third, she argues that some of the matters to be discussed in the hearing are classified as private or confidential under the Data Privacy Act. Fourth, she points out that matters discussed in the hearing may result in identification of the victim or victims. Lastly, since the review hearings are being conducted at the correctional facilities, security problems are created by allowing the general public to attend.

The Review Committee's response states that it does not oppose the motion to close the hearing, but notes that it believes that Ms. Johnson has somewhat overstated the grounds for relief. The Review Committee believes that some of the information cited by Ms. Johnson is actually public, that documents could be placed under seal to make them inaccessible to the public, and that victims could be identified by numbers known only to the parties and the Administrative Law Judge.

This hearing is conducted under the Administrative Procedure Act (Minn. Stat. §§ 14.001-14.69) and the Rules of the Office of Administrative Hearings (Minn. Rule pts. 1400.5100-8401). The general rule in contested case proceedings is that the hearings are public unless otherwise permitted or required to be closed. Minn. Rule pt. 1400.7800. The Community Notification statute is silent on whether or not the contested case proceeding is public. However, under Minn. Stat. § 14.60, subd. 2:

When the hearing record contains information which is not public, the Administrative Law Judge or the agency may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

Additionally, under Minn. Rule pt. 1400.6700, subp. 4, the Administrative Law Judge is authorized to make such protective orders as are reasonable and necessary.

It is the intent of the Office of Administrative Hearings to maximize the public nature of administrative proceedings and, where matters must be made not public, to employ the least restrictive limitation in each individual contested case. The general rule is that a party may waive a right to a public hearing, but that the party may not compel a private hearing. Singer v. United States, 380 U.S. 24, 35 (1965). In this case, the subject of the hearing seeks to make it private. However, since proceedings under the Community Notification Act are of public interest, it is not appropriate to close the hearing unless persuasive and compelling reasons are presented.

As the Review Committee points out, it would likely be possible to have a public hearing while concealing the identity of the victim and it would be possible to seal certain exhibits which need to be treated confidentially. However, in this case, a public hearing is clearly incompatible with the legislative intent in establishing the Community Notification Act. The purpose of the Act is to provide members of the public "adequate notice" about a sex offender who is about to be released from custody. The Act sets out the method for determining how much notice is to be provided in each case. Sex offenders about to be released are classified at three levels based upon factors set out in the statute. Generally, if an offender is assigned to Risk Level I, a law enforcement agency may disclose notice of the offender's release to other law enforcement agencies as well as to victims or witnesses. At Risk Level II, the agency may also disclose the information to public and private educational institutions, day care establishments, and establishments and organizations that primarily serve individuals likely to be victimized by the offender. At Risk Level III, the agency may also disclose the information to "other members of the community whom the offender is likely to encounter."

Conducting a public hearing would render the statutory procedure meaningless since it would permit full public disclosure contrary to the procedure set out in the statute. No offender would be able to utilize the appeal procedure if it had the result of increasing public disclosure over that proposed by the Review Committee. Although the statute does not specifically provide for a closed hearing, it does recognize the need for privacy by, for example, requiring that data collected and maintained by the Review Committee may not be disclosed. Accordingly, although the Legislature has not specifically addressed the public or private nature of this proceeding, its intent cannot be implemented if the hearing in this matter is public. The record and the final decision, which will contain evidence submitted at the hearing, will necessarily need to be classified "Not Public".

An additional factor is that this case is the first hearing under Minn. Stat. § 244.052, subd. 6. As a result, it is not certain what testimony or exhibits are likely to be presented in this proceeding. Once greater experience is acquired concerning implementation of this statute and the hearing process, it may be possible to make a more informed judgment on the "not public" nature of the proceeding.

In order to permit security arrangements to be made for the hearing, it is necessary to require the victim or law enforcement agency or their designees to advise the Chief Administrative Law Judge of their intent to attend the hearing. Whether or not they attend the hearing, each will receive a copy of the final decision.

K.E.J.